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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RONALD S. MONROE, PETITIONER,

v.

FRANK BLACKBURN, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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The most remarkable aspect of Respondent's Brief in Opposition to Petition for Writ of Certiorari ("Resp. Br.") is its utter failure to address the conclusion of the courts below that the State of Louisiana suppressed exculpatory evidence that "creates a reasonable doubt [as to Monroe's guilt] that did not otherwise exist." (Appendix B at 5).[1/] After a full and fair evidentiary hearing, the Magistrate recommended, as a matter of both fact and law, that a Brady violation had occurred (Appendix A); after a de novo review of the facts, the District Court so held (Appendix B); and the Fifth Circuit affirmed (Appendix E). But respondent -- who never appealed from the judgment of the District Court --

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1/ References are to the appendices attached to Monroe's Petition for a Writ of Certiorari dated April 15, 1985.

now almost totally ignores that judgment, not to mention the Magistrate's report. Instead, respondent simply unilaterally asserts that, on his version of the facts, a Brady violation should not have been found. And on the issue as to which petitioner has requested a writ of certiorari, respondent has said nothing to show why the scope of the remedy for a post-conviction Brady violation should be less than for all other Brady violations.

I

THE BRADY ISSUE

A. The State Ignores the Findings of Fact Below.

The State argues that petitioner is not entitled to any remedy, let alone a new trial, since there was no Brady violation in the first place. Resp. Br. at 5. "[A] thorough examination of the evidence produced at the hearing" before the Magistrate, the State asserts, could not lead to the conclusion "that the State of Louisiana unlawfully suppressed evidence which produced a reasonable doubt as to the guilt of Ronald Monroe." Resp. Br. at 12. The State does not bother mentioning, however, that after a "careful evaluation of the record" (Appendix B at 6), the District Court concluded just that, as had the Magistrate earlier.[2/]

2/ The State does not -- because it cannot -- show why the findings of fact in the Magistrate's report, adopted by the District Court after a de novo review, were "clearly erroneous." Griffin v. Missouri Pacific Railroad Co., 413 F.2d 9, 12-13 (5th Cir. 1969). In any event, the State may not here attack the judgment of the District

(Continued)

(1) Reasonable Doubt as to Guilt.

In reaching its conclusion that the suppressed evidence "creates a reasonable doubt as to Monroe's guilt that did not previously exist," the District Court made at least three crucial points: (i) that no physical evidence linked Monroe to the murder, (ii) that "the assertion that Stinson committed the murder [is] plausible," and (iii) that the only evidence directly linking Monroe to the murder -- "the eyewitness testimony of the victim's two children" -- is marred by "disturbing" aspects. (Appendix B at 5-6). The legal ruling of the Court of Appeals was premised on its acceptance of these findings.

The Magistrate stated, in a report which the District Court adopted as its own findings and conclusions, "It is hard to imagine evidence more potentially favorable to a defendant than the possibility of another person's confession to the crime coupled with a suggestion of a second source of information in support." (Appendix A at 8). For that reason, as supported by the close analysis of the facts in both the Magistrate's report (Appendix A) and the District Court's Memorandum Opinion (Appendix B), the evidence is material because "its suppression undermines confidence in the outcome of the trial." United States v. Bagley 53 U.S.L.W. 5084, 5087 (1985).

(Continued)

Court, because it failed to cross-appeal to the Fifth Circuit. (Appendix E at 960).

(2) Suppression.

Not satisfied to challenge only the materiality of the evidence, the State also asserts that "[t]he facts simply do not amount to a post-conviction suppression of evidence." Resp. Br. at 11. That assertion is so overwhelmingly contradicted by the undisputed evidence that the State itself has never made it before -- not ever to any one of the three federal tribunals below.

And suppression there was, as a matter of both fact and law. The Magistrate's statement on the subject is unimpeachable:

> It is undisputed that State authorities suppressed the evidence concerning George Stinson that they received from Detective Gallardo. Respondent has admitted that neither Ronald Monroe, his attorneys, nor anyone acting on Monroe's behalf was ever informed by anyone acting on behalf of the State of any of this information . . . [The] fact that the District Attorney's office may not have known of the information communicated by Detective Gallardo to the Police Department is immaterial. The obligation to disclose attaches whenever the police in the prosecuting jurisdiction possess exculpatory evidence. United States v. Agurs, 427 U.S. 97, 110 (1976); Giglio v. United States, 405 U.S. 150, 154 (1972); Freeman v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980)

* * *

The State's argument boils down to the assertion that it may unilaterally suppress exculpatory evidence which it determines is not credible. The whole point of Brady, Agurs, and most recently Bagley is to the contrary. In the words of the Louisiana Supreme Court:

> The Brady rules of disclosure apply not just to information favorable to the accused which the state itself believes to be credible, but to any material information that is favorable to the accused. . . . If the prosecution could under the aegis of Brady, disclose only that information favorable to the accused which it found to be believable, then the doctrine would become meaningless.

State v. Brooks, 386 So. 2d 1348, 1351 (1980) (emphasis in original).

B. The Appropriate Remedy Here Is a New Trial.

The State argues that a new trial is an inappropriate remedy since Monroe received a fair trial when it took place, even if thereafter the State suppressed material exculpatory evidence. See Resp. Br. at 16. But the State can put forth that argument only by disregarding the two crucial elements of the Brady violation: the findings of both the materiality of the exculpatory evidence and its suppression.

In finding a Brady violation, the District Court essentially found that a fair trial now before a reasonable jury which could evaluate the full range of evidence -- heretofore unavailable -- would not necessarily result in a conviction of Monroe. After a federal court has found that a reasonable jury might acquit Monroe on the present record because a reasonable doubt exists as to his guilt, there is no room left for the State to dispute the federal court's finding on that factual issue or to deny Monroe a new trial. Because Monroe's conviction is no longer based on evidence showing guilt beyond a reasonable doubt, it is inconsistent with the federal Constitution. Jackson v. Virigina, 443 U.S. 307, 309 (1979).

Indeed, this Court has recently reaffirmed the principle that a Brady claim is not to be decided by the same rigorous standards which might apply on a motion for a new trial based on newly discovered evidence obtained from a neutral source: "The standard of materiality applicable in

the absence of a specific Brady request is . . . stricter than the harmless-error standard but more lenient to the defense than the newly discovered evidence standard." United States v. Bagley, 53 U.S.L.W. 5084, 5087 (1985). Thus, the state court may not nullify the Brady violation found here by replacing federal constitutional standards with state standards.

Any other rule would destroy the prosecutor's motive to disclose exculpatory evidence, and reduce the judicial process to "a sporting contest." All the courts below have found that the State suppressed evidence that it had a duty to disclose. The vice of their rulings -- which we ask this Court to correct -- is that, despite the finding of suppression, the remedy afforded below negates any prosecutorial incentive to disclose by leaving the government in no worse position than if it had lived up to its solemn obligation to see that justice is done.

C. A New Trial Is the Appropriate Remedy Under the Exhaustion Doctrine.

When the State finally gets around to addressing the issue of the appropriate remedy for the Brady violation here, its main argument is that the remedy of a motion for a new trial is appropriate on the basis of the exhaustion doctrine. Resp. Br. at 13-15. This argument is without merit.

Monroe's state court petitions set forth the facts on which he now relies, and alleged a Brady violation.

(D.1A-9).[3/] His requests for discovery in state court were opposed by the state, and were denied.

On January 4, 1984 upon granting a stay of execution, and directing an evidentiary hearing, the District Court made it unequivocally clear that Monroe had exhausted his state court remedies. (D. 12-2; R. 21).[4/] Then, after the State's production of the McKenzie notes and an evidentiary hearing, the Magistrate, reviewed the prior proceedings in the state courts and came to exactly the same conclusion: "[P]etitioner has exhausted his state remedies" (Appendix A at 2). Thereafter, the District Court adopted those findings and conclusions "as its own." (Appendix B at 1). In affirming the District Court's holding, the Fifth Circuit stated that Monroe "filed this petition for habeus corpus," "[a]fter exhausting his state remedies . . . ." (Appendix E at 959).

The courts below were correct. The McKenzie notes, whose belated production the State now relies on to argue lack of exhaustion, were simply one additional piece of factual evidence considered in the Federal proceeding, and they merely confirmed what the State had never denied: that Sergeant Gallardo -- as related in his sworn, uncontested, affidavit presented to the state court -- called the New Orleans Police Department and reported the Stinson confession.

The exhaustion doctrine only requires a petitioner to exhaust all claims, not all evidence. See, e.g., Townsend

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3/ D.1A-9 refers to Document Number 1A of the Record on Appeal at page 9.

4/ "R.21" refers to appellant's Record Excerpts at page 21.

v. Sain, 372 U.S. 293, 317 (1963). Thus, the emergence of an additional fact at the federal hearing does not require a remand to state court. See, Picard v. Connor, 404 U.S. 270, 277 (1971) ("Obviously there are instances in which 'the ultimate question for disposition,' . . . will be the same despite variations in the legal theory or factual allegations urged in its support." (emphasis added)).

The cases cited by the State do not hold to the contrary. In those cases, unlike this one, the claims or factual allegations raised in federal court had never been presented to the state court. See, Burns v. Estelle, 695 F.2d 847, 850 (5th Cir. 1983) ("factual bases underlying petitioner's federal claim are significantly different from those underlying his state claim."); Brown v. Estelle, 701 F.2d 494, 495 (5th Cir. 1983) (three affidavits introduced in federal proceeding "added some substantiation to contentions which previously had no serious cooroboration.")

In any event, the State has long since waived its right to argue exhaustion. The State let Monroe come within eight hours of death, without ever bothering to check its own files where evidence tending to show Monroe's innocence sat untouched. It finally produced the evidence only in response to Monroe's subpoena duces tecum. It then made no attempt to remand the case to state court on exhaustion grounds, either before the Magistrate or District Court, but proceeded with the federal hearing never raising the exhaustion issue. Only after the District Court ruled against the State by finding that it violated Monroe's constitutional rights did the State suggest "exhaustion" as a ground for going back to square one.

II

THE GRIGSBY ISSUE

On the issue of whether a "death-qualified" jury is predisposed to favor the prosecution at the guilt phase of the trial and is unrepresentative of the community as a whole, the State does not -- because it cannot -- deny that a conflict in the circuits exists and that this is a current issue of exceptional public importance. The sheer number of circuits which has addressed the issue shows the diversity of legal opinion it has evoked. Indeed, since petitioner filed his petition for a writ of certiorari, yet another circuit has shown its interest. For this Court's information, we file herewith a supplementary appendix of the relevant portions of a transcript in which the Tenth Circuit requested special argument on this issue.

In view of this issue's complexities, we think that the State's argument on the merits is inappropriate in the context of a petition for a writ of certiorari. We point, however, to two inaccuracies in the State's brief.

First, the State's argument is premised on the inaccurate assumption that petitioner seeks to have included on his jury prospective jurors who, to avoid the possibility of the death penalty, would never vote to convict. In fact, petitioner agrees that such people, known as "nullifiers," are properly excluded from both the guilt/innocence phase and the sentencing phase of a jury in a capital trial. Petitioner's claim is simply that the jury should not exclude prospective jurors who state under oath that, although unable to apply the death penalty at the sentencing phase, they <u>are</u>

capable of impartially judging the defendant's guilt or innocence.

Second, the State cites the Fifth Circuit's statement that the District Court "reviewed the findings of the state court and saw no reason for a separate evidentiary hearing." Resp. Br. at 25 quoting Appendix E at 961. But there were, in fact, no findings of the state court. The state court rejected the substantial documentary evidence proffered by petitioner without considering it and refused to allow an expert witness to testify. Similarly, the District Court summarily rejected the claim without a hearing. (D. 12 at 2-8; R. 21-27). Petitioner seeks simply the opportunity to prove what this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968) said he is entitled to prove, namely that prospective jurors who are firmly opposed to the death penalty form a constitutionally cognizable group for the purposes of implementing the right to trial by a fair cross-section of the community under the Sixth Amendment.

III

INEFFECTIVENESS OF COUNSEL

The State asks this Court not to grant a writ of certiorari to determine whether petitioner was provided effective assistance of counsel because the claim is not supported by "specific errors made by trial counsel." Resp. Br. at 26. But petitioner has pointed to specific errors of major proportion.

First, petitioner's trial counsel knew that Collins' estranged husband Stinson might have murdered her but never actually investigated the possibility. The State denies that

this omission constituted ineffectiveness in light of the strength of the State's case. Resp. Br. at 28-29. But, since three federal tribunals have now found plausible the possibility that Stinson, not Monroe, in fact committed the murder, it is clear that vigorous investigation by defense counsel might have turned up evidence tending to show Monroe's innocence. In an adversarial system of justice, defense counsel in a capital case is ineffective if he does not pursue a substantial theory which might cast a reasonable doubt as to his client's guilt.

Second, petitioner's trial counsel, overlooking a wealth of available material, failed to either collect or present any character evidence showing why Monroe as an individual did not deserve to die. The State replies that the same jury which just convicted petitioner could "hardly be expected . . . [to] be swayed by a useless parade of individuals mouthing the praises of a convicted murderer," anyway. Resp. Br. at 28. But constitutional standards require a new and independent inquiry at the sentencing phase. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1977). Monroe was entitled to the jury's "particularized consideration of relevant aspects of [his] character and record" and to the jury's exposure to "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976). But because of trial counsel's abstract and academic presentation, Monroe was denied a meaningful and personal plea for his life.

In particular, petitioner's defense counsel argued to a Witherspoon-qualified jury that the death penalty should

not be inflicted under any circumstances. The argument was foredoomed to lose, since the jurors were seated only after rejecting that argument.

In short, petitioner asks this Court to grant the writ to determine whether counsel in a capital case is constitutionally ineffective when he leaves his client with virtually no defense whatever on either guilt or punishment, especially where, as here, compelling defenses were indeed available.

CONCLUSION

The petition for a writ of certiorari should be granted.

July 29, 1985

Respectfully submitted,

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SUPPELEMNTARY APPENDIX

Excerpts from Transcript of
Proceedings held before the
Tenth Circuit on April 17, 1985

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES COURTHOUSE

CHARLES TROY COLEMAN,

Petitioner-Appellant,

vs. No. 85-1094

JOHN W. BROWN, Warden,
Oklahoma State Penitentiary
at McAlester, Oklahoma;
LARRY MEACHUM, Director,
Department of Corrections,
State of Oklahoma; and
THE ATTORNEY GENERAL OF
THE STATE OF OKLAHOMA,

Respondents-Appellees.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings on the above-entitled case before the United States Court of Appeals, Tenth Circuit, sitting in Cheyenne, Wyoming, before the Honorable Chief Judge William J. Holloway, Jr., the Honorable James K. Logan, and the Honorable Stephanie K. Seymour, commencing on April 17, 1985.

Court Reporter: C. Frederick Cole, RPR
Official Court Reporter
District of Wyoming
Cheyenne, Wyoming

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I N D E X

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P R O C E E D I N G S

(Hearing proceedings commenced 10:45 a.m., April 17, 1985.)

CHIEF JUDGE HOLLOWAY: Be seated.

Because of the very serious nature of the case we have as you know made arrangements for the reporter to assist us and to have this argument transcribed.

I mentioned before, and I am not sure, Mr. Lee, that you were there, that we want to be assured that you each know that we have a full hour, although for convenience of yourselves and the court, the case was calendared as a B case, it is being treated as a full A case with a full argument of the full hour, and we will entertain motion for more time if need be, because we view the case very seriously with you.

You may proceed in the Coleman case.

MR. MUNSON: Thank you.

This matter comes on appeal before this court upon a denial of a petition for writ of habeas corpus pursuant to 28 USC 2254.

CHIEF JUDGE HOLLOWAY: Would you permit me to interrupt you just a minute?

MR. MUNSON: Yes, sir.

provided late with a preliminary hearing transcript in this particular case. I think that --

CHIEF JUDGE HOLLOWAY: You think he had that in advance of trial?

MR. LEE: I'm sure he did, Your Honor, although I don't think the record reflects. All we know is that Mr. Pearson never complained of it. And in view of the fact that Mr. Pearson seemed to complain about everything, I feel sure that that would have been in the record.

I think the record shows that the preliminary hearing transcript he said he was just given is the one from Tulsa County which the prosecutor states on the record that he was going to give him, so Mr. Pearson would know what the testimony of Officer Perish, the officer in Arizona who was kidnapped by the petitioner, would testify about.

CHIEF JUDGE HOLLOWAY: Just a moment, Counsel.

(Brief pause.)

CHIEF JUDGE HOLLOWAY: The panel, we have all studied intensely on the issues you have been covering, and we are aided by your comments, but we are concerned about Grigsby.

MR. LEE: Yes, sir.

CHIEF JUDGE HOLLOWAY: And we would suggest you address that, and we will allow opposing counsel reasonable time, whatever he needs, to address that.

MR. LEE: Yes, sir.

CHIEF JUDGE HOLLOWAY: We have this morning checked, the State of Arkansas is going to file a petition for certiorari, and they have asked for an extension of time. I think in effect they are really asking the Eighth Circuit to stay their mandate in Grigsby. And as yet, though, from what information we obtained this morning from the clerk of the Eighth Circuit was, that the petition has not been filed, but that's the status of it, the latest that we have, unless you know further.

MR. LEE: No, I have no further information. As a matter of fact, I have been waiting for the Federal Reporter on Grigsby to come, and I haven't been able to find it. I have noticed there is a companion case, Ruiz versus Lockhart, which has been reported, and it refers to another case along those same lines, but I still can't find the reported case of Grigsby, although I have a copy of it.

The majority opinion in the Grigsby case specifically noted that their opinion conflicts with the opinion of three other circuits. Well, I don't know if they specifically mention the three other circuits, but they mention that it does conflict with other circuits. And we in our brief contend that it conflicts with the rulings of the Fourth Circuit, in the Keeten versus Garrison case, the Fifth Circuit case in the Smith versus Balkcom case, and the McCleskey case out of the Eleventh Circuit.

So we feel like the Eighth Circuit and the Grigsby case is wrong in their reasoning. Of course we wish the Tenth Circuit to follow the lead of the Fourth, Fifth and Eleventh Circuits for the reasons which I am about to discuss.

In the majority opinion in the Grigsby case they rely of course very heavily on a number of things, like mock court situations, public opinion polls, the Harris Poll, things like that. This same evidence was essentially reviewed by the other circuits in rejecting the same contention.

I might first initially note that in the Keeten case the Fourth Circuit stated, however, that they felt like that these polls really are inconclusive, or these studies are inconclusive and,

if anything, they show that the defendant is demanding a defendant-prone jury.

CHIEF JUDGE HOLLOWAY: Did any of the circuits, though, have the extensive record that Judge Isley had with both testimony by several experts, plus the studies?

MR. LEE: I believe at least two of those particular cases deal with those studies, specifically note those studies in their footnotes.

CHIEF JUDGE HOLLOWAY: There is in addition live testimony in Arkansas by a number of witnesses, which is cited by Judge Isley in his opinion.

MR. LEE: Yes.

CHIEF JUDGE HOLLOWAY: That's what troubles me, that we have a little difference in the record from those circuits than what we seem to have from the Eighth Circuit.

MR. LEE: Yes, I don't think any of those particular circuits specifically deal with the same testimony -- well, they all came before the Eighth Circuit.

CHIEF JUDGE HOLLOWAY: Yes.

MR. LEE: The second Grigsby case. I don't think they specifically mentioned the same

testimony. I think that it is important, however, that I don't think any of that testimony would change the rationale used by the Fourth, Fifth and Eleventh Circuit in reaching the opinion they did.

For example, they note in footnote 9 in the Keeten case, they pointed out that the 1971 Harris Poll, which is relied on by the defendant in this case, and which the Grigsby majority cited in their opinion. They stated that the Witherspoon excludable people were specifically asked the question whether or not they would vote not guilty even knowing that there would be a second chance to vote against the death penalty in the second stage.

And the poll reviewed that 56 percent of the Witherspoon excludable stated that they would still vote not guilty, because there would be a chance of the death penalty being imposed upon the defendant.

So all three of these circuits, in the Smith versus Balkcom case, they discuss the earlier cases of Spinkellink case, where as I stated the Fifth Circuit specifically stated that they think what the defendants are asking for are defendant-prone juries, and not fair and impartial ones, jurors that we feel like the state is entitled to a

jury which would follow the law.

CHIEF JUDGE HOLLOWAY: If you throw them all in don't you just get the mix, for both the plaintiff-prone and the defendant-prone, if you don't exclude them?

MR. LEE: Well, the Smith versus Balkcom court specifically stated that the extremes in both situations have to be excluded. You have to exclude jurors who state that they will automatically vote for the death penalty no matter what the case. You have to exclude the other extreme, the jurors that state that they would automatically -- is that they would be opposed to the death penalty.

And of course we know that the Witt versus Wainwright case has now changed the test. The state doesn't have to show automatically opposed, but just that it would substantially impair with the jurors' duties.

I think it is important.

CHIEF JUDGE HOLLOWAY: So that you are really now excluding a larger phase of the community under Witt, the exclusion is larger, is it not?

MR. LEE: Because you are excluding the Witherspoon excludables?

CHIEF JUDGE HOLLOWAY: Isn't the Witherspoon excludable class group enlarged after the Witt opinion?

MR. LEE: Well, I really don't think that there is really going to be that much difference. You look at the voir dire in the Witt versus the Witherspoon case, and in my view that particular juror was not going to consider the death penalty. I think in our case the jurors that were excluded by Judge Summers, and of course we know that his determination is entitled to a presumption of correctness, I think that under either test that none of those jurors were going to sit in a death penalty case.

I want to make one important point, though, about what the Fifth Circuit stated in the Smith case, because I think it is a very important point.

It said that they talked about what was called the "whimsical doubt," and they stated that if you adopt what the defendant wants, you have a jury which in the second stage the jury has been instructed not to consider anything that happened, and you are probably going to have a jury that didn't hear the evidence that took place in the first stage, if you go along with what the District

Court in the Grigsby case stated requiring two separate jurors now.

JUDGE LOGAN: The circuit didn't agree with that, did they?

MR. LEE: No, they sent it back and said it is up to Arkansas to make that decision, and presumably Arkansas couldn't make the decision.

JUDGE SEYMOUR: But, presumably, we are going to have to look at those studies and the evidence and make our own judgment about the value of them. Assume we agree with Judge Isley, and the Grigsby majority that there is value in those studies, what is the problem with the suggestion made in Grigsby that you could have one jury with extra alternate jurors who would listen to all of the evidence, and then you would do the death qualification voir dire at the end after the conviction and exclude only those who could not vote for the death penalty, and the same jury who heard the evidence would decide the penalty phase?

MR. LEE: The problem is, that I don't think the Fourteenth Amendment and the Sixth Amendment requires that ~~crime~~ [illegible] of complexity imposed on the state criminal justice system.

JUDGE SEYMOUR: Even assuming the

validity of those studies?

MR. LEE: I think those studies are studies made by people who make their decisions based on polls, based on --

JUDGE SEYMOUR: But you are disputing the validity of the studies. And that's a separate issue. I want you to assume the validity of the studies, if we should decide that the studies are sufficiently validated by the Grigsby record, assuming that, what is the problem with the suggestion made in Grigsby?

MR. LEE: Like I said I think the problem is federalism. I think that is just too complex a scheme of capital sentencing to be imposed on criminal justice --

JUDGE SEYMOUR: We could have extra alternates.

MR. LEE: -- because I think that the state has a right to have a jury which is selected from the very beginning to sit on the entire case of a defendant, and listen to all the evidence, and to state from the very beginning that they can consider all statutory options and consider all points of law which can be raised.

And I think that, particularly when you

read the Wainwright versus Witt case, I think at that time Grigsby is way out of line with what the Supreme Court right now feels. I think it is way out of line with what the Supreme Court intended in the Witherspoon decision, particularly looking at note 21 in that decision, and as I stated it is adverse with what three other circuits have decided.

JUDGE SEYMOUR: Of course Witt very much focuses on the right of a jury that will decide the case basically from the evidence, doesn't it?

MR. LEE: That's correct.

JUDGE SEYMOUR: It doesn't really deal with the two-jury system because that issue wasn't in front of it?

MR. LEE: That's correct.

JUDGE SEYMOUR: If those studies support the notion that you are not getting a fair cross selection in that sense for the guilt phase, if you exclude this class of people, then don't we really have a Sixth Amendment problem?

MR. LEE: Of course, the dissent in Grigsby pointed out that the Tenth Circuit has made probably the best definition of what constitutes a cognizable group, which if they are excluded violates the defendant's right to a cross section of

the community. The case of United States versus Test. Of course it is an en banc opinion by this court. And this circuit set forth three factors in making that decision.

And in my view, the fact that you have a group of individuals who philosophically are in agreement on that particular issue, does not mean you exclude them, that does not fit within the definition of this circuit setup, in this particular case there was a case involving the defendant alleged that people twenty-one to thirty-nine years of age were being excluded and they constituted a cognizable group in the community, and this circuit rejected that contention.

And as the dissent in Grigsby pointed out, I don't think that a grouping of people who just happened to have the same opinion about the death penalty constitute a cognizable group.

I might go back if I could.

JUDGE LOGAN: If we would petition a cognizable group now it would eliminate them.

MR. LEE: Any two people that have an agreement about a philosophical point are a cognizable group.

CHIEF JUDGE HOLLOWAY: People who

group themselves as Democrats or Republicans have views, but you couldn't have an exclusion based on political affiliation.

MR. LEE: Yes, but I think that the factors set forth by the court in the test require something more than that. I think Democrats and Republicans share a more of a community interest, which is a third factor in that test other than just people who are just randomly selected from the community, and just happen to be in agreement about this philosophical or religious point.

I think Democrats and Republicans share much more than just general -- just agreement about one particular issue. I think they are much more of a united and cognizable group.

I just want to say that as I was about to say to Judge Logan, the majority in the Smith Case specifically talks about the idea about excluding people from the jury that have not heard the first stage, and they talk about the fact, they called it a "whimsical doubt," and they feel like it would be more detrimental to a defendant to have a jury on the second stage that had not heard the evidence on the first stage.

They say the jurors in the second stage or

when they decide punishment use things, all kinds of considerations, for example, the strength of the state's case. I think it is really common knowledge that a jury is not going to be as likely to vote that a defendant receive the death penalty in the case just really is kind of weak.

JUDGE SEYMOUR: What about giving the convicted defendant the option after the conviction to decide whether he wanted to go forward with the same jury or a separate one?

MR. LEE: Again I guess it just gets back to my point before my federalism argument. I really don't -- and I don't mean to say the same thing, although I guess I just really feel like that the Sixth Amendment as applied by the Fourteenth Admendment just doesn't really require that. And there is nothing that the United States Supreme Court has said in any of their opinions, since Witherspoon, which would in any way imply that that has to be done.

JUDGE LOGAN: Counsel, let me ask this question slightly different. This discussion is assumed that if we would adopt the Grigsby result that there would have to be a new trial on Mr. Coleman. Is there such a thing as harmless error?

I mean Chapman versus California says that a lot of constitutional error can be harmless beyond a reasonable doubt.

In a case like this the evidence is incredibly overwhelming, how could any jury on a cross section on a guilt phase have come out differently than they did?

Your opposition counsel as I read the brief says that if this is a Sixth Amendment question there is no such thing as harmless error in the Sixth Amendment. Do you agree with that or is it possible for us to adopt the Grigsby result for future cases but apply a harmless error standard?

MR. LEE: Off the top of my head, I cannot think of any case which says that the harmless error could not be adopted in this case. And I would certainly request the court to do so, because obviously every death penalty case in the Eighth Circuit has been affected by the Grigsby case.

And obviously, if the Tenth Circuit adopts that same reasoning, it will affect -- I mean virtually every capital defendant raises a Witherspoon issue. And it is just in virtually every one that comes up, and it is preserved at trial.

I mean every competent defense attorney is

going to be objecting to systematic exclusion of Witherspoon excludable people. So it is preserved in every death penalty case generally.

So every death penalty is going to be affected, certainly in Oklahoma, and certainly throughout the circuit. So I would hope, and I can't think of any exceptions to the harmless error rule other than in the cases dealing with exculpatory evidence.

There is a little bit different standard due to the three types of evidence, but I can't see why in this case -- and I might kind of interject at this particular point, the voir dire reveals that the judge I think was very careful and particularly left on the jury a woman who had reservations about the death penalty, Patty McNeil, and I believe her voir dire statements are on page 110 and 112, where she states initially that she has reservations about the death penalty. But the court left her on.

And I think in view of the fact that we have only three that were excluded for that reason, and considering a review of the entire voir dire, I would hope that even if this court does accept what the Eighth Circuit has done that they will find in this particular case, with all the evidence in this

case, that it is harmless error.

JUDGE LOGAN: At least you would be entitled to a jury that would have to say that they could weigh the evidence and find guilt if that was the law, wouldn't they, even though it is a possibility later somebody would have to determine whether he lived or died?

MR. LEE: Yes.

JUDGE LOGAN: And your position I assume is that any such person would have had to vote for guilt on the evidence in this case?

MR. LEE: I'm not quite sure if I understand you.

JUDGE LOGAN: Well, this case wasn't a close case in any way, shape or form?

MR. LEE: No, sir.

JUDGE LOGAN: And in a close case Grigsby excludables might make a difference in whether there was guilt or innocence in determination, but I assume your position is no conscientious person could have found this person innocent of first degree murder?

MR. LEE: I think that in the first stage that no reasonable jury, I mean that there is no reasonable doubt as to -- look at the Jackson

versus Virginia standard or any kind of a standard like that, the Chapman versus California, that no reasonable jury could have found the verdict anything other than what they did in this case.

CHIEF JUDGE HOLLOWAY: Unless they are a Witherspoon excludable that votes not guilty to prevent the danger of a death penalty?

MR. LEE: Yes, if they are in that 56 percent that the Harris Poll referred to, the 1971 Harris Poll.

CHIEF JUDGE HOLLOWAY: What would be wrong, though, if the Witherspoon excludables were all lined up and put back in, and everybody put back in to hear the evidence on guilt?

MR. LEE: I think that's the same question Judge Seymour asked.

CHIEF JUDGE HOLLOWAY: I just don't quite see why that might not work.

MR. LEE: I mean maybe if I was in the legislature or something like that, or any of us would have been in the legislature trying to make that determination, maybe we might vote for that. But I think that the review of the federal court is much different.

CHIEF JUDGE HOLLOWAY: For balance the

jury can't be less than six?

MR. LEE: That's correct.

CHIEF JUDGE HOLLOWAY: There are quite a few that the constitution placed on all of us.

MR. LEE: That's correct.

CHIEF JUDGE HOLLOWAY: And just based on my contact myself with the criminal justice system.

MR. LEE: I really personally can't agree with them saying, "Oh, I think that there are a very lot of strong law and order people that just have a real problem with the death penalty, that would be very quick to convict people that just have a real religious problem."

And Mr. Pearson in his voir dire and in his closing argument worked real hard on that, about "Would you be willing to tell your grandchildren or your children that you sent a man to his death." And I think I really question just from my own practical standpoint as a human being and as a lawyer the validity of saying that because somebody is, I mean that these particular jurors are going to be more conviction-prone, I just -- I really don't think that Fourteenth Admendment principles should be based on that.

JUDGE SEYMOUR: That's not the argument, the argument is that somebody that believes strongly in the death penalty would be more conviction-prone. You are talking about the people that don't believe in the death penalty. And the studies allegedly show that those people are more likely to reasonably assess the evidence; isn't that the basic argument of the studies in Grigsby?

MR. LEE: That people who strongly believe in the death penalty are more likely to be prosecution-prone?

JUDGE SEYMOUR: Yes. And less likely to pay attention to constitutional issues in the course of the trial.

MR. LEE: Well, that could be possible. I think my time is up.

MR. MUNSON: If I may take just a moment, I need to comment on a couple of things that opposing counsel went through first, which I don't think are going to raise any questions. If I do, I'm sure you will ask, but just to point up we are not saying Mr. Pearson is incompetent counsel, we are saying he is ineffective counsel. I do think there is a difference there.

I think we have shown that in our briefs and

I think that is made very clear with what our claim is, because ineffective counsel is the case, the test under the Strickland case.

In regards to the comments of Mr. Pearson building a point for his client by his statements contained therein, it appears to me that that doesn't logically carry out that if Mr. Pearson is not even concerned to the point to prepare for the second stage, how is he to prepare for the appeal stage? I mean, you know, he has by his own statements got into the second stage and he certainly is not thinking about the appeals stage. I think we have to give credence to his statement about his unpreparedness, and I think that is pointed out.

JUDGE LOGAN: It gives you a better case if he decided and discussed and thought about and admitted that he thought about the penalty phase and decided he couldn't put on the family members because it wouldn't do any good, it gives you a better shot on an appeal by saying that he didn't even think about it, or he didn't have time to prepare for the appeal stage.

MR. MUNSON: I understand that, but I do think we have to give credence to the truthfulness of counsel statements that he really

did not prepare.

In regard to the alibi witness and the importance of that. As anyone who has done work in the criminal area that's correct in your investigation, and specially in regard to a alibi witness, some of the important things you talk to that alibi witness, is persons who can support their testimony, and so often times one alibi witness leads to another.

So, you know, we just are without anything but pure speculation as to what a proper investigation had been done as to the alibi witness and using that in the first stage, what that could have led to if there had been proper investigation.

I still think it is important for it to be shown, and I think there are cases upon this, and they are cited in the briefs, that despite the convictions that a family member could have been cross-examined on by the state, to just show that there is someone out there that cares about this defendant, and that even inspite of knowing about these convictions, is important, in this case, we have nothing to show that anyone whatsoever cares about this defendant to put on in the second stage.

Not even the defense attorney, because he

gets up and as set out in the briefs, sets himself we feel aside from the appellant, the defendant in that case, saying that he won't object to the finding of the guilt or not even to the death penalty if they should oppose it. And, therefore, you know, that's emphasizing that point. And perhaps witnesses, the family who was present, if they had known what they could have put on, what they were willing -- or would have been willing to testify to, there may have been some consideration by the jury that maybe this man ought to live, maybe there is some hope.

I realize that flies in the face of their position, and the number of aggravating circumstances, but I think that certainly has to be weighed, because in this case we have no mitigating evidence.

The factors that were stated as to the trial attorneys success in the matters that he presented, I would ask the court in looking at the record to notice that all of those involve cross-examination. Now cross-examination comes about from the state's witnesses as to their testimony, and at the same time the trial counsel had the appellant sitting at his side able to assist him to cross

examine those witnesses as to those factors.

Where he puts on, in essence, no defense, he makes no opening statement in either stage, and no closing statement even in the second stage, I don't believe the jury is left with much choice as to the status that this appellant stands in with regard to his trial counsel.

Now moving to the Grigsby matter, I think there are several things that we have got to consider on what we are looking for in this as with any jury, is that impartial jury, that jury that can impartially weigh the facts and make decisions.

Under cross-examination as stated in the Grigsby case, the state was unable to defeat the positions of their studies and their expert testimony. I think this is one thing that makes the Grigsby case especially strong from that standpoint.

Not only the studies from the previous cases were presented, but testimony was presented and those experts were cross-examined as to that testimony and those studies.

The state presented nothing in opposition to those studies.

CHIEF JUDGE HOLLOWAY: I suppose, though, that the test case, and our en banc opinion

there by cognizable groups, this is a somewhat novel cognizable group, distinct from others that we have been accustomed to dealing with, is it not?

MR. MUNSON: Yes, I would have no problem with agreeing with that to an extent.

CHIEF JUDGE HOLLOWAY: In fact, I don't know of any that are quite like this one. If we are going into cognizable groups of this sort we may have quite a number of others develop.

MR. MUNSON: I am not saying that that won't happen, because as law has developed over the years, new factors come into play in anything, you can see the development of search and seizure and what has gone through, you know, since the Miranda decision.

So I'm not saying that that won't come about. But that does not mean that those things should not be considered if they do have a valid basis. I think rightly so there should be. And you may think that I or trial counsel or this court sitting here en banc today may not have thought of at this point, that by scientific study and research may be proven to be a fact. I don't think we just laugh at scientific study. I think we have to give it its dues and its consideration, and I think

that's what happened in the Grigsby case.

Now as was pointed up I believe just on a comment here earlier, we are looking at a jury that if we use this portion that we call Witherspoon excludables, on the guilt stage, we are getting into the conviction-prone area. And that's saying that if these persons sit in the first stage, that they are more likely to convict, as well as impose the death penalty.

Part of this is because they have been qualified and that has been enforced upon them from the very beginning of their being called as a juror.

I think the studies, and that is what the court relied upon for this showing of conviction-proneness, therefore, has to relate to the first stage and not just the second stage, and that may be a problem with putting those excludables on an alternate panel for selection later on. Because the harm may have already occurred by the fact that these studies shows that those persons are conviction-prone, therefore, we are faced with that before we bring these excludables back into play.

So I think that has to be --

JUDGE SEYMOUR: Isn't the theory that you would put the excludables on in the conviction

stage and take them off in the penalty stage?

MR. MUNSON: Yes. Yes. Excuse me if I have quoted that wrong. But that is the case. And that I feel would give us or lend more towards this impartial jury composed of a cross section of the community because they would be included in that phase of it.

Now I want to call one final comment here. In regard to the voir dire of the jury in the Coleman case, the counsel for the defendant in that matter, Mr. Coleman, did not voir dire those jurors that were excused. That was done upon the court's questioning and the court summarily dismissing those jurors.

The record, the transcript will show that, and we have set it forth in the appendix also, the full testimony of those. That that was done upon the court's questioning of the jurors, and not any voir dire by the defendant's counsel.

JUDGE SEYMOUR: That is bad if the jurors fairly clearly say they couldn't impose the death penalty?

MR. MUNSON: I think any defendant's counsel should be given an opportunity to question as to that, and I particularly point it out in our

reply brief. The reason I say that is because I feel a wrong statement of the law was given, and when they just talked about the death penalty, and didn't leave the jurors with the option of excluding life imprisonment or the death penalty, and on voir dire by counsel, he could have questioned and corrected and found out.

Now if you are faced with the situation where you have a choice, where you are not absolutely frozen in to having to give the death penalty and nothing else, would your answer be the same?

And that opportunity was not presented at all. I think there are some rehabilitative efforts towards clarification of a juror's position as to the death penalty, that could have been done by counsel being allowed to voir dire. But they were summarily dismissed by the court, and then the objection made by the trial counsel to that.

CHIEF JUDGE HOLLOWAY: There was no effort by Mr. Pearson to ask for permission to rehabilitate them?

MR. MUNSON: No, there was not. He did ask on one juror, who was excused, but it was for a different reason, it was because that juror had talked with some other jurors, and he was denied

that opportunity, I am assuming from that, he felt he would be denied any opportunity at all.

Based upon the factors as we have set forth, including the matters of the Grigsby case, which I know are fairly recent, and we think get into very fundamental constitutional guarantees, which must be corrected if they are found to be incorrect, we feel the issues that we presented show that the matter has not been fairly, correctly handled by the court, and that the judgment should be reversed as a serious violation of the appellant's right, or at the very least, as to the ineffective assistance of counsel, that a full evidentiary hearing should be held, and the defendant, the appellant herein, allowed the opportunity to testify, to be present as to the ineffectiveness arguments that he personally feels, and certainly he would be the one who could relate to those.

And I might mention one other point, that there was some restriction even at the post-conviction relief hearing that was held of my cross-examination of Mr. Pearson, because of he and the court's consideration and concern about confidentiality between attorney and client. And that would not have been the case had my client been present.

For those reasons we would ask the court to give this due consideration.

JUDGE SEYMOUR: I have one more question.

MR. MUNSON: Yes.

JUDGE SEYMOUR: I would like you to address Judge Logan's question about the harmless issue question. Even if you agreed with the Grigsby court wouldn't it be harmless error not to have left those jurors on?

MR. MUNSON: In light of how the studies showed, the tendency towards conviction-proneness, of juries qualified in this manner, that because it only takes one juror not to find the person guilty, I think that very much cannot be then laid aside as harmless error.

JUDGE SEYMOUR: Does the harmless error standard apply? You concede that the harmless error standard applies?

MR. MUNSON: No, I don't believe it does. We are dealing with fundamental constitutional rights, the right to a trial by jury, by impartial jury, and I don't see that harmless error would ever apply to that selection of those persons who are going to be sitting in judgment as

to a human being and his life.

JUDGE SEYMOUR: All right.

MR. MUNSON: Thank you.

CHIEF JUDGE HOLLOWAY: The court appreciates the conscientious and able presentation in your briefs and your argument from both the petitioner and the state.

The case is submitted.

Counsel are excused.

And the court will be in recess until 9:00 o'clock tomorrow morning.

(Hearing proceedings adjourned 12:10 p.m., April 17, 1985.)

C E R T I F I C A T E

I, C. FREDERICK COLE, Official Court Reporter for the United States District Court for the District of Wyoming, do hereby certify that I reported by machine shorthand the proceedings contained herein on the subject hearing on the date hereinbefore set forth, and that the foregoing 76 pages, constitute a full, true and correct transcript.

Dated this 25th day of April, 1985.

C. FREDERICK COLE
Official Court Reporter